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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOE BOEHMS — **Plaintiff -Petitioner**

V.

CRAVEN CROWELL, in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority; BILL KENNOY, in his official capacity as a member of the Board of Directors of the Tennessee Valley Au' ority; JOHNNY HAYES, in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority

Defendants - Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does a failure to reasonably mitigate damages cut off all backpay in an age discrimination case (the "no mitigation - no backpay" rule)?

2. Where an age discrimination plaintiff is not required to accept a discriminatory demotion to a job which is not substantially similar, does he fail to mitigate his damages where he later fails to apply for the same the job the employer sought to demote him to?

3. Is a successful age discrimination plaintiff entitled to seek an award of attorney fees when the defendant is an agency of the United States?

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REPORTED OPINIONS

1. Memorandum Opinion of the United States Magistrate Judge Jerry A. Davis, 1996 WL 671335 (N.D. Miss. Oct.1, 1996).

2. Boehms v. Crowell 139 F. 3d 452 (5th Cir. 1998).

JURISDICTIONAL STATEMENT

Petitioner seeks a review the April 15, 1998 Opinion of the United States Court of Appeals for the Fifth Circuit, 139 F. 3d 452 (5th Cir. 1998).

Petitioner timely sought a rehearing before the Fifth Circuit, which motion was denied on June 12, 1998.

This Court has jurisdiction to review all decisions of the United States Circuit Courts of Appeal pursuant to 28 U.S.C. § 1254 (1).

RELEVANT STATUTORY PROVISIONS

29 U.S.C. § 633a, Nondiscrimination on Account of Age in Federal Government Employment:

> **(a) Federal agencies effected.** All personnel actions affecting employees or applicants for employment who are at least forty years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in § 102 of Title V, United States Code, in executive agencies as defined in § 105 of Title V, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those

units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal government having positions in the competitive service, and in the government printing office, the general accounting office, and the Library of Congress, shall be made free from any discrimination based on age.

. . .

(c) Civil Actions; Jurisdiction; Relief. Any person aggrieved may bring a civil action in any federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this act.

. . .

(f) Applicability of Statutory Provisions to Personnel of federal departments, etc. Any personnel action of any department, agency, or other entity referred to subsection (a) of this section shall not be subject to, or affected by, any provision of this act, other than the provisions of §12(b) of the act and the provisions of this section.

STATEMENT OF CASE

Petitioner Joe Boehms was working for the Tennessee Valley Authority (TVA) as a regional manager, over its Tupelo, Mississippi operations. Due to a restructuring, the Regional Managers were reclassified as "Customer Service Center (CSC) Managers." At the same time as the reclassification, the new position of Operations Manager (OM) was created, which would report to the CSC Manager in a subordinate capacity. The jobs of Regional Manager and CSC Manager were substantially the same job.

On January 14, 1992, Boehms was denied the CSC Manager's job and was instead offered the subordinate OM's job for the Tupelo office. The decision to deny Boehms the CSC manager's job was based upon Boehms' age (55 years old at the time of nonselection).

When Boehms refused to accept the discriminatory demotion, he was informed that his job was being "surplussed" and that he had the option of either resigning or entering the Employee Transition Program (ETP). Boehms chose to enter the ETP, which allowed him to remain in a temporary job classification with TVA for a number of months while looking for similar employment, both inside and outside of TVA.

While in the ETP, Boehms was offered two different OM's slots, jobs which were not substantially similar to the CSC Manager's job which Boehms was discriminatorily denied. Boehms did not accept either of these two offers.

While Boehms was in the ETP, no CSC Managers' jobs came open, and Boehms attempted to find substantially similar work outside of TVA as part of his participation in the ETP.

Boehms stayed in the ETP, attempting to find substantially similar employment until November of 1992, when he was reduced in force. After he was terminated, Boehms invoked his retirement privileges but continued to seek employment after retiring from TVA. Boehms eventually found employment as a manager with the City of Okolona Electric Department in April 1994.

If Boehms had accepted the discriminatory demotion to OM, he would have continued to receive the same pay he received as Regional Manager, which was between $4000 - $5000 less than what he would have received had he not been discriminatorily denied the CSC Manager's job.

JURISDICTION OF COURTS

Age discrimination of federal employees is made illegal by 29 U.S.C. § 633a, and the District Court had federal question jurisdiction over the petitioner's age discrimination claim, pursuant to 28 U.S.C. §1331. After the District Court issued its order, petitioner filed a Motion to Alter or Amend Judgment, which was denied. Petitioner timely filed an appeal to the United States Court of Appeals for the Fifth Circuit which has jurisdictional review over the final decisions of the District Courts of the United States, pursuant to 28 U.S.C. § 1291.

ARGUMENT IN SUPPORT OF WRIT OF CERTIORARI

I.

There is an irreconcilable split among the Circuits as to how to treat a failure to mitigate damages. The Fifth Circuit's view of the "no mitigation-no backpay" rule, Booker v. Taylor Milk Company, Inc., 64 F. 3d 860, 867 (3rd Cir. 1995), appears to be the minority view, and petitioner prays that this Court will review the issue to reunite the Circuits on this issue.

In the case at bar, Boehms v. Crowell, 139 F. 3d 452 (5th Cir. 1998), the Court adhered to the rule first stated in Jurgens v. EEOC, 903 F. 2d 386 (5th Cir. 1990), that a failure to reasonably mitigate damages cuts off all backpay regardless of whether reasonable mitigation could equal complete mitigation of lost wages, and thereby falling on the side favoring the "no mitigation - no backpay" rule.

It was undisputed that if Boehms had not been discriminatorily denied the CMC Managers job, he would have made between $4000 and $5000 more a year than would have been possible to reasonably mitigate. Even if Boehms

had mitigated his damages by accepting an OM job, he would have still suffered a significant loss of pay.

In Albemarle Paper Co. V. Moody, 422 U.S. 405, 421, (1975), a Title VII case, this Court stated that victims of unlawful discrimination were to be made whole "so far as possible. . .to a position where they would have been were it not for the unlawful discrimination." In Phelps Dodge Corp. V. National Labor Relations Board, 313 U.S. 177, 198 (1941), this Court stated that "since only actual losses should be made good, it seems fair that deduction should be made not only for actual earnings by the worker, but also for losses which he wilfully incurred." This line of reasoning seems to imply that a failure to mitigate does not totally cut off backpay, but should only be taken into account when calculating the amount of backpay.

In line with the Fifth Circuit view is Baggett v. Program Resources Inc., 806 F.2d 178, 182 (8th Cir., 1986), ("as a general rule, a discriminatee is not entitled to backpay where he or she fails to make a good faith effort to find work."), (but see EEOC v. Delight Wholesale Co., 973 F.2d 644, 670-71 (8th Cir., 1992)).

The "no mitigation - no backpay" rule was specifically rejected by the Third Circuit in Booker v. Taylor Milk Co., supra. Accord, Syvock v. Milwaukee Boiler Manufacturing Co., Inc., 665 F.2d 149, 159-60 and n.13 (7th Cir. 1981); Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338, 1345 (9th Cir. 1987); Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269, 1273-74 (4th Cir. 1985).

Petitioner therefore prays that this Court will reunite the split between the Circuits on this issue.

II.

The Fifth Circuit has engrafted upon the duty to mitigate, a requirement that a discriminatee accept a

demotion in order to mitigate damages.

When Boehms was denied the CMC Manager's job, a job which the trial court found to be almost exactly the same job as his Regional Manager's job, he was offered the subordinate job of OM. The court found that this job was not substantially similar to the CMC Manager's job, and Boehms therefore did not have to accept that job to mitigate his damages. When Boehms did not accept the OM job, he was placed into a temporary slot into the Employee's Transition Program, a position which allowed Boehms to stay on the TVA payroll while looking for substantially similar work, both inside and outside TVA. While in the transition program, Boehms was offered two OM slots, which were the same job which he had previously turned down, but in other locations. Again, the courts below correctly held that Boehms was not required to accept these offers.

However, when the transition program ended, the courts held that Boehms was then required to accept an OM's job, pursuant to the Fifth Circuit's reasoning in Jurgens v. EEOC, 903 F.2d 386 (5th Cir., 1990).

In Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61 (5th Cir., 1980), the court first gave weight to the rationale that combating discrimination should take place "within the confines of the work place," Jurgens v. EEOC, 903 f. 2d at 389,90, footnote 4, citing Bourque v. Powell. The Boehms Opinion relied upon Jurgens to cut off all backpay from the date of Boehms termination and invocation of his retirement privileges, Boehms v. Crowell, 139 F.3d at 462, in spite of Boehms' admittedly "earnest search for better employment." EEOC v. Delight Wholesale Co., supra at 670.

The court chose, under those facts, to require that Boehms prove "constructive discharge" in order to not have his damages completely cut off. Boehms, 139 F.3d at 461-62. The court stated that,

> while (1) we lend a sympathetic ear to Boehms' claim that it makes little sense to hold, on the one hand, the acceptance of the Operations Manager position *was not required* to mitigate damages, but hold, on the other hand, that it *was required* to recover backpay beyond the date of retirement; and (2) we acknowledge as persuasive his claim that had he accepted the Operations Manager position, he may have been eligible to receive the non-mitigated portion of his damages beyond November of 1992 (i.e., the date of his retirement), we nonetheless are bound by our precedent under Jurgens, to hold as we do. Boehms, 139 F.3d at 462 (emphasis in original).

The trial court held, and the Appeals Court acknowledged, that the OM job was not consonant with Boehms' background and skills and that it was not a substantially similar job to the District Manager's job which he had previously held or the CMC Manager's job which he was denied, but then required him to accept this demotion and to remain in employment with TVA in order to mitigate his damages.

This is appears to be in clear opposition to the Supreme Court's holding in Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32 (1982), that "the unemployed or under employed claimant need go into another line of work, accept a demotion, or take a demeaning position. . . ."

Even though the Fifth Circuit "acknowledge[d] as persuasive" Boehms' position and lent "a sympathetic ear" to Boehms' claim that the Court's holding seems to "make little sense," the court found itself bound by its precedent under Jurgens, supra.

Petitioner seeks review of this court to release the Fifth Circuit from its bondage to a position that "makes little sense."

III.

The Fifth Circuit in Boehms v. Crowell, supra, held that a Plaintiff suing an agency of the Federal Government for age discrimination cannot be awarded attorney fees under 29 U.S.C. §633a. Other Circuit Courts ruling on this issue seem to have all held likewise. See e.g., Nowd v. Rubin, 76 F.3d 25, 27 (1st Cir. 1996).

Petitioner contends that the availability of "such legal or equitable relief as will effectuate the purposes of this act," 29 U.S.C. §633a(c), explicitly provides the authority to award attorney's fees against the Federal Government. If the purpose of the statute is to make federal employees "free from any discrimination based on age," 29 U.S.C. §633a(a), they are not free from the effects of age discrimination if a large part, if not all, of any recovery for damages has to be paid as attorney fees. If attorney's fees are not allowed against the Federal Government, it would make it much less likely that federal employees who have been discriminated against on the basis of their age could find competent legal representation. This would have an effect quite the opposite of effectuating the purposes of the statute. Petitioner therefore believes that the Fifth Circuit Court of Appeals is in error on this issue and seeks review of this Court.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-60030

JOE F. BOEHMS,

Plaintiff-Appellant-
Cross-Appellee,

versus

CRAVEN CROWELL, in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority; BILL KENNOY, in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority; JOHNNY HAYES, in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority,

Defendants-Appellees-
Cross-Appellants.

Appeals from the United States District Courtfor the Northern District of Mississippi

April 15, 1998

Before HIGGINBOTHAM and STEWART, Circuit Judges, and WALTER,[1] District Judge.

STEWART, Circuit Judge:

This case, which calls for us to decide among other things the recoverability of attorney's fees in an Age Discrimination in Employment Act ("ADEA") suit against

the government, arises from Joe Boehms' 1992 nonselection as manager of the Tennessee Valley Authority's Customer Service Center in Tupelo, Mississippi.[2] The court below found that Boehms' nonselection was age-based discriminatory, but refused to extend Boehms' back pay award beyond the date of his consequent retirement. Mindful of Boehms' limited recovery, the court awarded him attorney's fees.

On appeal, Boehms challenges only the court's decision to limit his back pay award. Defendants Craven Crowell, Bill Kennoy, and Johnny Hayes, acting in their official capacities as members of the Board of Directors of TVA (collectively, "defendants"), cross-appeal the determination of liability, the award of attorney's fees, and the finding that Boehms sufficiently mitigated his damages during the time between his nonselection and retirement. We reverse the award of attorney's fees and remand for further proceedings. Otherwise, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1961, Joe Boehms ("Boehms") began working as an engineering aide for TVA's power business. At the time, this business was organized into two separate divisions, the power systems operations division (the "operations division") and the power use and distributor relations division (the "marketing division"). The operations division produced electricity and constructed and maintained TVA's transmission lines; it ensured that TVA's distributors (*i.e.*, its customers) received TVA's final product -- electricity. The marketing division, of which Boehms became an employee, administered TVA's power contracts, maintained distributor relations, and promoted efficient electricity use in the community.

In 1988, in connection with an extensive

reorganization aimed at decentralizing TVA's central offices and bringing decision-making closer to its distributors, TVA scrapped its divisional structure and placed the previously separate "operations" and "marketing" functions under the unified command of fifteen (15) district offices. Boehms, who had steadily risen through the management ranks of the marketing division, was appointed manager of TVA's Tupelo, Mississippi district. For the first time in his career, Boehms became directly responsible for making day-to-day operations-related decisions. Despite Boehms' claimed difficulty in learning the necessary skills, TVA acknowledges that his overall performance as district manager was viewed favorably by both supervisors and Tupelo district distributors.
In April of 1991, TVA effected another reorganization, downsizing its fifteen (15) district offices into thirteen (13) customer service centers. Effective January 20, 1992, each customer service center ("CSC") was to be headed by a CSC manager, who in turn, was to be assisted by a CSC operations manager and a CSC marketing manager. Hoping to retain his command over the Tupelo office, Boehms applied for the CSC manager position. He was 55 years old at the time.[3]
On January 14, 1992, Boehms' supervisor, Glenn Parrish, informed Boehms that Van Wardlaw, Boehms' 32-year old subordinate, was being offered the Tupelo CSC manager position, and that the position of CSC operations manager was available if Boehms so desired it.[4] Deeming the offer a "demotion," Boehms rejected it. Parrish immediately handed Boehms a pre-prepared letter informing him that his job was being "surplussed," and that he had the option of either resigning or entering the Employee Transition Program ("ETP"). Boehms chose to enter the ETP, which allowed him to remain with TVA for up to six months while he looked for similar employment both within and without TVA.
While in the ETP, Boehms twice rejected offers for the West Point, Mississippi CSC operations manager position, and

refused to entertain numerous other advertised operations manager positions. Not once did a CSC manager position become available during this time. In November of 1992, having been unsuccessful in his efforts to secure suitable employment, Boehms was "reduced in force." Boehms invoked his retirement privileges before departing.[5]

In January of 1994, Boehms sued TVA, alleging, *inter alia*, that TVA violated ADEA § 633a when it refused to offer him the Tupelo CSC manager position. Boehms asserted that his experience as district manager made him the superior candidate for the position, and that his nonselection was due to age. As evidence of age discrimination, he presented, among other things: (1) Parrish's interview notes reminding him (Parrish) not to talk about age; (2) testimony that each district manager under Parrish's authority that was younger than 45 was offered a CSC manager position; and (3) testimony that each district manager under Parrish's authority that was older than 45 was not offered a CSC manager position, but instead was offered a CSC operations manager position. In response, TVA contended that Boehms' nonselection was due to his negative "approach to organizational change" and his lack of an "aggressive and proactive leadership style." TVA argued that its business judgment in this regard should not be disturbed.

The parties agreed to a bench trial before a magistrate judge. On May 15, 1996, the court held that Boehms was subjected to age discrimination when he was not selected for the CSC manager position, and that he sufficiently mitigated his damages by participating in the ETP program (*i.e.*, he was not required to accept the Tupelo, or any other, operations manager positions that became available). On October 1, 1996, after receiving further briefing on the issue of damages, the court decided that the circumstances surrounding Boehms' retirement did not amount to a constructive discharge, and therefore, his back pay award should not

extend beyond his November 1992 retirement.[6] Noting Boehms' limited recovery, however, the court awarded him "a reasonable attorney's fee." Contesting the limitation on damages, Boehms filed a motion to alter and amend the judgment, which the court rejected on December 20, 1996. As explained above, the parties now challenge various aspects of the lower court's resolution of this case.

DISCUSSION

I. Sufficiency of the Evidence

ADEA §633a(a) provides, in pertinent part, that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in executive agencies . . . of the Federal Government . . . shall be made free from any discrimination based on age." 29 U.S.C. §633a(a). An ADEA plaintiff, suing under § 633a, may use either direct or circumstantial evidence to prove that intentional age discrimination occurred. Woodhouse v. Magnolia Hosp., 92 F.3d 248, 252 (5th Cir. 1996).

In the instant case, TVA contends that the evidence was insufficient to support the lower court's holding that Boehms' nonselection was motivated by discriminatory animus, and argues that the court's finding erroneously nullified Parrish's sound business judgment in finding Wardlaw to be the better qualified candidate. In considering such a sufficiency challenge, we view the evidence in the light most favorable to the verdict, and defer to all reasonable inferences made by the trial court in support of its judgment. A trial court's ultimate factual finding of discriminatory intent will not be reversed unless it is clearly erroneous. E.E.O.C. v. Bailey Ford, Inc., 26 F.3d 570, 572 (5th Cir. 1994).

The burden-shifting framework through which an ADEA plaintiff develops evidence from which a factfinder may infer discrimination is well established. First, the plaintiff must establish by a preponderance of the evidence a prima facie case of discrimination, after which the burden

shifts to the defendant to advance a legitimate, nondiscriminatory reason for the challenged employment action. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 992-93 (5th Cir. 1996) (en banc). Once the defendant meets this burden of production, the plaintiff must demonstrate that the defendant's proffered explanation is not the actual reason for its decision, but is instead a pretext for discrimination. Id. at 993.

Because the ebb and flow of burden-shifting is intended to apply at *interim* stages of a proceeding -- *i.e.*, when a party's rights are affected by a record containing less than full proof, see Smith v. Farah Mfg. Co., Inc., 650 F.2d 64, 68 (5th Cir. 1981) -- a reviewing court need not examine the adequacy of the showing at any stage of the burden-shifting framework after a case has been fully tried on the merits. Woodhouse, 92 F.3d at 252-53. Rather, when both parties have been allowed to present their full proof, a reviewing court's duty is simply to determine "whether there was sufficient evidence from which a reasonable trier of fact could have concluded that age discrimination occurred." Id. In making this determination, we must examine both the direct and circumstantial evidence supporting the factfinder's ultimate conclusion that age was a determinative factor in the challenged employment decision. Id. at 253. "Although age need not be the sole reason for the adverse employment decision, it must actually play a role in the employer's decisionmaking process and have a determinative influence on the outcome." Id.

TVA argues that Mr. Parrish simply exercised prudent business judgment in finding Wardlaw to be the better qualified CSC manager candidate, and that the trial court's judgment amounted to unwarranted "judicial second-guessing of [his] employment decision." Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 959 (5th Cir. 1993). At trial, Parrish claimed that Boehms was unfit for the Tupelo CSC manager

position because he lacked both an innovative leadership style and had a negative approach to organizational change. Parrish's low measure of Boehms was corroborated by an October 1991 employee evaluation form, in which Parrish gave Boehms "low" marks in the areas of "innovating," "oral communications," and "subordinate development," and stated that Boehms "need[ed] to take more risks." Testimony adduced at trial indicates that Parrish's negative assessment of Boehms stemmed principally from Boehms' alleged failure to proactively: (1) curtail the encroachment of a creek onto property containing one of TVA's high voltage transmission towers; (2) handle negotiations between one of TVA's distributors and the distributor's customer concerning a heat pump loan; and (3) manage an employee's complaint concerning overtime.

Our review of the record reveals considerable evidence to suggest that Parrish's negative evaluation of Boehms in this regard was overblown, if not disingenuous, and that Boehms was in fact extremely qualified for the Tupelo CSC manager position. Defendants concede on appeal that Boehms' "skills and performance as a district manager were recognized and appreciated by [both] his supervisors and [TVA's] customers." Several reliable witnesses -- among them current and former employees of the Tupelo office (*i.e.*, Ebb Loden, Jr., Sherry Garrett, William Long), as well as managers of Tupelo office customer-distributors (*i.e.*, Mr. Hollowell, Mr. Grisham, Mr. Collier) -- testified that the duties of the new CSC manager position were virtually *identical* to those commendably performed by Boehms as district manager.[2] In addition, Eddie Trammel -- Boehms' direct supervisor from October 1988 through April 1991 and the CSC manager of TVA's Johnson City Customer Service Center at the time of trial -- testified that Boehms possessed all the skills necessary to perform the duties of Tupelo CSC manager. Trammell's

testimonial claim was substantiated by his favorable evaluations of Boehms during the time he (Trammell) was Boehms' supervisor. In fact, Parrish's subdued October 1991 employee evaluation of Boehms, based on a mere five months of supervision, was the sole blemish in Boehms' otherwise impressive track record of favorable appraisals concerning his performance as district manager. In light of this evidence, we cannot say that the trial court's finding that Parrish's stated reasons for Boehms' nonselection (*e.g.*, failure to manage an employee's overtime problem) were "blown out of proportion." Our review of the record indicates that Parrish's explanations for Boehms' shortcomings were pretextual in nature, and were likely made to justify the subsequent offer to him of the subordinate operations manager position.

Furthermore, while the ADEA should not "transform the courts into personnel managers," it clearly is intended to protect older employees from employment decisions "which are unlawfully motivated." Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1508 (5th Cir. 1988). While mere acceptance of an employee's favorable assessment of his own qualifications generally cannot permit a factfinder to conclude that an employer's reasons for a challenged employment action are pretextual, the presence of other evidence -- for example, "information about the ages of other employees in plaintiff's position, the treatment and evaluation of other employees, or the employer's variation from standard evaluation practices" -- may suffice to tip the scales in favor of a finding of discriminatory intent. Id; see also Rhodes, 75 F.3d at 994 ("A jury may be able to infer discriminatory intent in an appropriate case from substantial evidence that the employer's proffered reasons are false.").

Here, we observe that each of the former district managers under Parrish's authority that was younger than the age of 45 was offered a CSC manager position. We also

observe that each of the former district managers under Parrish's authority that was *older than the age of 45* was not offered a CSC manager position, but instead was offered a CSC operations manager position. In light of numerous witnesses' credible testimony indicating that the duties and obligations of the district manager position were analogous to those of the new CSC manager position, we refuse to view Parrish's selections in this regard as coincidental, or (for that matter) justifiably premised on the candidates' qualifications. Rather, we perceive Parrish's selections to have been infected by discriminatory animus. Moreover, Parrish's own interview notes -- which contained the notation "[d]on't talk about age" -- demonstrate that he was cognizant of Boehms' age during the interview process. In sum, our review of the record confirms the presence of substantial evidence indicating that Parrish's rationale for Boehms' nonselection (*i.e.*, Boehms was unqualified based on his handling of certain managerial problems) was a pretext for illegal age discrimination. We conclude that the magistrate's finding that Boehms was discriminated against on the basis of age was not clearly erroneous.

II. Damages

In reviewing a trial court's determination of damages, we examine all issues of law de novo. Rhodes v. Guiberson Oil Tools, 82 F.3d 615, 620 (5th Cir. 1996). "Absent an error of law, [the court's] award of compensatory damages presents an issue of fact, subject to the clearly erroneous standard of review." Id.

A. Mitigation

In the instant case, the trial court found that Boehms reasonably mitigated his damages by entering the ETP, and

by searching for substantially similar employment both before and after his retirement from TVA.[8] According to the magistrate, Boehms was not required to accept the Tupelo operations manager position in order to satisfy his duty to mitigate, despite the fact that his salary in that position would have been identical to the one he had earned as district manager. This finding was based on an assessment that the operations manager position was "inferior" to the CSC manager position, both in status and supervisory and budgetary authority.[9] A trial court's finding that a plaintiff reasonably mitigated his damages is a factual determination, reversible on appeal only if clearly erroneous. Id.

On the basis of our holding that "where an employer discriminatorily denies promotion to an employee, that employee's duty to mitigate damages encompasses remaining on the job," Jurgens v. E.E.O.C., 903 F.2d 386, 389 (5th Cir. 1990), defendants contend that Boehms failure to continue his "existing employment relationship" with TVA -- *i.e.*, by refusing each of the operations manager positions that became available after his nonselection -- constituted a breach of his duty to mitigate damages. We reject this argument, simply on the basis that Boehms -- unlike a typical nonselectee for a promotion -- did not have the option to remain in his "existing employment relationship." As discussed, the position of Tupelo district manager, Boehms post for over two years, was being eliminated pursuant to TVA's reorganization implementing customer service centers. The operations manager position, although it would allow Boehms to "remain on the job" in some sense, brought with it only a subset of the supervisory and budgetary responsibilities of the former district manager position. In such circumstances, we find that it was impossible for Boehms to "remain [in his existing] job," and therefore, we decline to apply our holding in Jurgens to this case.

Defendants next contend that if in fact Boehms' nonselection

to the position of CSC manager was aged-based discriminatory, Boehms' damage award should reflect his subsequent failure to diligently seek replacement employment. See Sellers v. Delgado Community College, 839 F.2d 1132, 1139 (5th Cir. 1988) ("If an employer proves that an employee has not made reasonable efforts to obtain work, the employer does not have to establish the availability of substantially comparable work."). Defendants argue that once Boehms voluntarily entered the ETP, a position without supervisory responsibilities or an operating budget, he had a duty -- under the "reasonable efforts" standard -- to accept any employment that would "better" his position from that *in the ETP*. According to defendants, Boehms breached this duty, and thus failed to mitigate his damages, by "steadfastly refus[ing]" to accept any of the several operations manager positions that became available while he was in the ETP. We are unimpressed by this argument, as it would lead to the untenable result that a claimant in Boehms' position must accept almost any position that becomes available while participating in a temporary employee assistance program -- provided it qualifies, as it likely will, as an improvement over his position therein. This court has noted, in the context of a Title VII failure to promote case (sex discrimination), that a claimant breaches his duty to "exercise reasonable diligence to minimize damages," and "forfeits his right to backpay[,] if he refuses a job substantially equivalent to the one he was *discriminatorily denied*." E.E.O.C v. Exxon Shipping Co., 745 F.2d 967, 977 (5th Cir. 1984) (citing Ford Motor Co. v. E.E.O.C, 458 U.S. 219, 232 102 S.Ct. 3057, 3065, 73 L.Ed.2d 721) (1982) (emphasis added). Therefore, our focus in a mitigation analysis -- and the base from which all comparisons about whether "reasonable efforts" to obtain comparable work are made -- must be the employment position with respect to which discrimination occurred. Defendants' contention that Boehms was required to accept

any employment that would "better" his position from that *in the ETP* is therefore meritless under our holding in Exxon Shipping. We have already determined under the instant facts that Boehms was discriminatorily denied the position of *Tupelo CSC manager*. Defendant's brief makes no claim that Boehms failed to use reasonable efforts to seek substantially similar or "better" employment *vis a vis* the denied CSC manager position. After a careful review of the record, we are convinced that the magistrate did not commit clear error in finding (1) that Boehms' duty to mitigate damages was satisfied by his participation in the ETP, and (2) that this duty was not breached by his refusal to accept any operations manager positions during the ensuing six-month period.

B. Determination of Damages

The parties next dispute whether the magistrate correctly determined that Boehms was not owed back pay beyond his November 1992 retirement from TVA. After requesting and receiving further briefing on this issue, the magistrate found that the controlling case requires an employee to prove constructive discharge before post-retirement back pay may be awarded, and that, under the facts of this case, Boehms could not establish the "aggravating factors" necessary to support such a finding. See McCann v. Litton Systems, Inc., 986 F.2d 946, 951 (5th Cir. 1993). In so holding, the magistrate particularly noted that Boehms' situation was not materially distinguishable from the former district managers who voluntarily chose to remain with TVA as CSC operations managers.

In Jurgens v. E.E.O.C., 903 F.2d 386 (5th Cir. 1990), a similar discriminatory denial of promotion case, we were also called upon to decide whether the trial court correctly applied the constructive discharge rule to limit the plaintiff's recovery to *pre-retirement* back pay. In Jurgens, Jules

Gordon, an EEOC Assistant Regional Attorney responsible for establishing trial strategies and supervising seven to twelve attorneys, was denied a promotion to the position of Regional Attorney on the basis of his race. Jurgens, 903 F.2d at 387-88. Approximately three years later, pursuant to a neutral agency-wide reorganization, the EEOC targeted the position of Assistant Regional Attorney for elimination. Id. at 388. To accommodate Gordon, the EEOC offered him two options: (1) a demotion to the position of Supervisory Trial Attorney, a station with no managerial responsibilities and supervision of only three to five attorneys; or (2) an early retirement, triggering an annual $15,000 annuity. Id. Perceiving the offer of the Supervisory Trial Attorney position to be degrading, Gordon chose to retire from the EEOC and then sued for discriminatory failure to promote. Id. As damages, he sought, *inter alia*, compensation for lost wages beyond the effective date of his retirement. Id. Because we perceived that the "policies underlying [anti-discrimination] laws [are] best served if, wherever possible, unlawful discrimination is attacked within the context of existing employment relationships," id. at 390 (quoting Bourque v. Powell Electric Mfg. Co., 617 F.2d 61, 65-66 (5th Cir. 1980)), we held that 'in order for [Gordon] to recover back pay for lost wages beyond the date of his retirement or resignation, the evidence must establish that [he was] constructively discharged [by the EEOC]." Id. at 389. Because the offered position of Supervisory Trial Attorney was not "inherently demeaning, especially when it was offered as part of a racially neutral reorganization," id. at 392, we found the circumstances surrounding Gordon's retirement insufficient to establish a constructive discharge. Gordon was thus not owed back pay beyond the date of his retirement.

Boehms argues that the constructive discharge rule articulated in Jurgens should not be applicable under the

instant facts because his "retirement" from TVA was in fact an *actual* discharge (*i.e.*, a termination). In making this claim, Boehms alerts us to the fact that he was "reduced in force" when his stint in the ETP came to an end. We disagree with Boehms' position, and note that the instant facts are nearly identical to those observed in Jurgens -- *i.e.*, after a discriminatory denial of promotion, Boehms (like Gordon) was offered a one-level demotion and a loss of some supervisory responsibilities.[10] Because no finding was made in Jurgens that these circumstances constituted an actual discharge, and because such a finding (or lack of finding) was indeed sound, we refuse to hold otherwise here. As such, to recover back pay beyond the date of his retirement, Boehms must show that he was constructively discharged from TVA. When he chose to retire from TVA, Boehms had, at the very least, an offer to remain as Tupelo CSC manager at the same salary he had been earning as district manager. In addition, several district managers other than Boehms accepted positions as CSC operations managers pursuant to TVA's agency-wide reorganization. These facts alone convince us that the working conditions that would have confronted Boehms as operations manager were "not so intolerable that a reasonable person would have felt compelled to resign," Jett v. Dallas Indep. School Dist., 798 F.2d 748, 755 (5th Cir. 1986), or that the offer of the operations manager position was itself a "harbinger of dismissal." McCann, 986 F.2d at 952. While (1) we lend a sympathetic ear to Boehms' claim that it makes little sense to hold, on the one hand, that acceptance of the operations manager position *was not required* to mitigate damages, but hold, on the other hand, that it *was required* to recover back pay beyond the date of retirement; and (2) we acknowledge as persuasive his claim that had he accepted the operations manager position, he may have been eligible to receive the non-mitigated portion of his damages beyond November of 1992 (*i.e.*, the date of his

retirement), we nonetheless are bound by our precedent under Jurgens to hold as we do. The magistrate did not err in applying the constructive discharge rule to find that Boehms' back pay recovery did not extend beyond the date of his retirement.

III. Attorney's fees

Lastly, we consider defendants' claim that the magistrate erroneously awarded Boehms attorney's fees under the ADEA. The magistrate reasoned that our decision in Smith v. Office of Personnel Management, 778 F.2d 258, 264 (5th Cir. 1985), cert. denied, 476 U.S. 1105, 106 S.Ct. 1949, 90 L.Ed.2d 358 (1986), allowed attorney's fees awards to stand against the federal government, and that the purposes of the ADEA would "clearly" be effectuated by an award in this case, *i.e.*, given Boehms' rather limited recovery. We review the trial court's decision to award attorney's fees for an abuse of discretion. E.E.O.C. v. Clear Lake Dodge, 60 F.3d 1146, 1153 (5th Cir. 1995).

Section 633a of the ADEA, which authorizes federal employees such as Boehms to bring suit on age discrimination claims, was enacted in 1974, roughly seven years after the private sector ADEA scheme was introduced. Lewis v. Federal Prison Indus., Inc., 953 F.2d 1277, 1283 (11th Cir. 1992). Subsection (c) of section 633a provides that a claimant in a civil action may receive "such legal and equitable relief as will effectuate the purposes of [the ADEA]." 29 U.S.C. §633a(c). In 1978, Congress amended section 633a to include subsection (f), which provides that the provisions applicable to governmental employees "shall not be subject to, or affected by, any provision of [the ADEA], other than . . . the provisions of . . . [section 633a] [and one irrelevant exception]." As such, because section 633a comprises a "separate and discrete [ADEA] remedial

scheme" for federal public sector employees, Lewis, 953 F.2d at 1277, any relief granted against a federal employer in an ADEA civil suit must flow from, and be justified under, the "will effectuate the purposes" provision of subsection 633a(c). Palmer v. General Services Admin., 787 F.2d 300, 301 (8th Cir. 1986); cf. 29 U.S.C. §626(b) (specifically providing for attorney's fees awards in private sector ADEA cases). We now hold that ADEA subsection 633a(c) may not be used to award attorney's fees against the federal government.

The magistrate's reliance on our decision in Smith to award fees in this case was erroneous, as Smith did not involve a claim of whether attorney's fees are recoverable against the government in an ADEA suit. Smith, 778 F.2d at 264. Confronted only with a dispute concerning the amount of attorney's fees awarded, we simply held in Smith that the district court did not err in calculating the amount of fees awarded to the plaintiff. Id. Unlike the government in Smith, defendants here raise a challenge to the propriety of awarding fees under the ADEA, and we -- after carefully considering this issue of first impression -- uphold their challenge.

In doing so, we adopt the rationale of the First Circuit's decision in Nowd v. Rubin, 76 F.3d 25, 27 (1st Cir. 1996), which found the language of ADEA subsection 633a(c) unable to overcome either the doctrine of sovereign immunity or the so-called American Rule of attorney's fees. Under the principle of sovereign immunity, the United States may not be sued except to the extent it consents by statute; any waiver of immunity must be *unequivocally expressed*, with all uncertainties being resolved in favor of the government. Nowd, 76 F.3 at 27 (citations omitted); see also Shanbaum v. United States, 32 F.3d 180, 182 (5th Cir. 1994) (citations omitted). Under the "American Rule" of attorney's fees, absent *express*statutory authorization to the contrary

(and a few nonapplicable exceptions), litigants are required to pay their own attorneys' fees. Nowd, 76 F.3d at 27 (citations omitted); see also Galveston Nav. Dist. v. Hopson Towing Co., 92 F.3d 353, 356 (5th Cir. 1996) (citing Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141(1975)).

Simply put, the generalized language of subsection 633a(c) -- authorizing "such legal or equitable relief as will effectuate the purposes of [the ADEA]" -- cannot be interpreted as an *express* authorization of fee-shifting on Congress' part, much less an *unequivocal* waiver of the government's sovereign immunity *vis a vis* awards of attorney's fees. Nowd, 76 F.3d at 27. Consequently, like the First Circuit, we find subsection 633a(c) "insufficient to overcome either the American Rule or sovereign immunity." Id. The magistrate abused his discretion in awarding Boehms attorney's fees under the ADEA.

We nonetheless remand the case to the magistrate to determine if Boehms may be awarded attorney's fees under the Equal Access to Justice Act, 28 U.S.C. §2412(b) (the "EAJA"). Nowd, 76 F.3d at 28. The EAJA provides, in pertinent part, that "[u]nless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought . . . against the United States . . . to the same extent that any other party would be liable under . . . the terms of any statute which specifically provides for such an award." 28 U.S.C. §2412(b).

The First Circuit's identified two principal reasons to support its view that prevailing public sector ADEA plaintiffs may be awarded attorney's fees under the EAJA. Nowd, 76 F.3d at 28. First, noting that the ADEA specifically authorizes attorney's fees awards against private sector employers, see 29 U.S.C. §626(b) (incorporating by reference the attorney's fees provision of the Fair Labor

Standards Act, 29 U.S.C. §216(b), into the private sector ADEA scheme), the court found it "entirely consistent with the EAJA's purpose that the United States, *qua* employer, assume responsibility on a completely equal footing with private sector employers in regard to attorney fee awards under the ADEA." Id. (internal quotations and citations omitted); see EAJA §2412(b) (permitting attorney's fees awards against the government "to the same extent that any other party would be liable under . . . the terms of any statute which specifically provides for such an award."). Further, "in keeping with the proviso to EAJA §2412(b)," the court reasoned that ADEA §633a(c) "cannot be said -- by its silence . . . -- to '*expressly* prohibit[]' attorney fee awards against the United States." Nowd, 76 F.3d at 27 (emphasis added). Finding the First Circuit's reasoning to be sound in this respect, we likewise conclude that the EAJA enables trial courts to award attorney's fees against the federal government in ADEA cases. We therefore remand this case to the magistrate for a determination of whether Boehms' attorney fee award may stand under the EAJA.

CONCLUSION

Based on the foregoing reasons, we AFFIRM the finding that Boehms' nonselection to the position of Tupelo CSC manager was based on illegal age discrimination. Likewise, we AFFIRM the calculation of his back pay award. However, we REVERSE the award of attorney's fees under the ADEA, and REMAND for further proceedings to determine whether such award may stand under the EAJA.

1. *District Judge of the Western District of Louisiana, sitting by designation.

2. [1]The Tennessee Valley Authority ("TVA"), by virtue of being a public corporation, is an executive agency of the federal government. See 16 U.S.C. §831; 5 U.S.C. § 105.

3. [2]While the 1991 reorganization was being implemented,

Boehms' job title was changed from "district manager" to "regional service manager." Because this change was purely cosmetic, and did not accompany a change in duties, we will continue to use the term "district manager" to refer to Boehms' pre-1992 position at Tupelo.

4. [3]Parrish became Boehms' supervisor in connection with TVA's 1991 reorganization. Prior to the January 14, 1992, meeting, Parrish had been Boehms' supervisor for approximately eight (8) months.

5. [4]Boehms continued his search for employment after retiring from TVA. This search ended in April of 1994, when he accepted a managerial position with the Okolona Electric Department, a customer of TVA's.

6. [5]Boehms was awarded the sum of $4,688.24, reflecting the back pay for the period between his nonselection on January 15, 1992, and his retirement on November 13, 1992.

7. [6]On this point, we note that the position of CSC manager, like the former position of district manager, maintained full authority over the Tupelo office's operations and marketing. Moreover, this authority was executed under similar staff and budgetary constraints: whereas the former district manager (*i.e.*, Boehms) supervised 53 employees under an operating budget of $2.6 million, the new CSC manager supervised 49 employees under an operating budget of $ 3.3 million.

8. [7]As discussed above, Boehms was unsuccessful in his efforts to secure suitable employment during his stint in the ETP. Boehms did not find an acceptable job until over a year and a half after he retired from TVA, when he took a managerial position with a TVA customer.

9. [8]In this regard, we note that the operations manager position showed an operating budget of $2 million with supervision over approximately 32 employees. By comparison, the former district manager position showed an operating budget of $2.6 million with supervision over 53 employees and the CSC manager showed an operating budget

of $3.3 million with supervision over 49 employees. In addition, testimony elicited from a number of current and former employees of TVA, as well as from several managers of Tupelo office customers, establishes that the operations manager position would have been a "demotion" for Boehms. Lastly, it does not escape us that, by offering Boehms the operations manager job, Parrish was asking Boehms to report directly to a man who, just the day before, had been Boehms' subordinate.

10. [9]The position of operations manager continued to be available at the time of Boehms' departure from TVA (*i.e.*, after his six-month stay in the ETP was complete).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JOE BOEHMS — PLAINTIFF

V. — NO. 1:94CV21-JAD

CRAVEN CROWELL, ET AL — DEFENDANTS

MEMORANDUM OPINION

Joe Boehms alleges he was the victim of age discrimination when in January 1992 at the age of 55 he was not selected to be manager of Tennessee Valley Authority's Customer Service Center (CSC) in Tupelo, Mississippi, in violation of 29 U.S.C. §633a (1988). The court, after reviewing the trial evidence, must agree with Plaintiff's conclusion.

Facts

Boehms, an engineer, began his career with TVA on November 13, 1961, as an engineering aide. He earned a degree from the University of Tennessee in Nashville in 1970 after attending school nine years while working for TVA full-time. After graduation he became a commercial industrial engineer for TVA. Over the years he rose in the organization and his job responsibilities increased. In 1988 during a major reorganization, Boehms was appointed district manager in Tupelo, where for the next four years he performed his duties admirably, according to his supervisor, Glenn Parrish.

Another restructuring or reorganization in 1991/1992 "surplussed" Boehms' job, which was redesigned and entitled CSC manager, with an operations manager (OM) position equal in pay but subordinate in status. The new CSC

manager's position in reality was extremely similar to the district manager's position which he had formerly held. Contrary to Plaintiff's expectations, Parrish did not offer Boehms the CSC manager position, which went to his former subordinate, Van Wardlaw, aged 32. When Boehms declined the OM position, he was offered retirement or retraining in the six-month employee transition program (ETP). He agreed to participate in the ETP, and during that time was offered the OM position in West Point, Mississippi, but declined it also. At the end of the six-month program, he retired from TVA and took a part-time position at Okolona Electric Department as the interim manager.

Liability

In an employment discrimination case, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. If the plaintiff succeeds in proving the prima facie case, an inference of unlawful discrimination is raised. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 992 (5th Cir. 1996) (en banc). The burden of production shifts to the defendants to proffer a legitimate, non-discriminatory reason for their employment decision. Id. The defendants may meet their burden by presenting evidence that "if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." Id., quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, ___, 113 S. Ct. 2742, 2747, 125 L. Ed. 2d 407 (1993). If the legitimate, non-discriminatory reason for the employment decision is believed by the fact-finder, plaintiff is given the opportunity to demonstrate that the defendants' stated reason is merely a pretext for discrimination. Id. The ultimate issue is whether age actually motivated and was a determinative factor in the employment decision. Hazen Paper Co. V. Biggins, 507 U.S. 604, 611, 113 S. Ct. 1701, 1706, 125 L. Ed. 2d 338 (1993).

Much of trial time was spent on convincing the court that the Parrish evaluation of Wardlaw as a better choice than Boehms for the CSC manager's position was not pretextural, but was instead a "business judgment." Parrish testified that he felt Wardlaw, a nine-year employee, was better qualified than Boehms, because he "had the skills and the leadership to move the organization forward, to meet the new vision and the competition and the changes that were going to take place in the utility industry." Parrish compared Wardlaw and Boehms on traits such as leadership, community involvement, innovation and drive, based on interviews, and job appraisals. He stated he believed Wardlaw to be superior; therefore, Boehms was offered the subordinate position.

No one contested the ability of either man, with time, to handle either job, but the testimony was overwhelming that Boehms' experience and training would have best prepared him for the CSC position while Wardlaw's experience and training would have best prepared him for the OM position. Wardlaw had been a line supervisor, the lowest level of supervision, over fewer than 15 employees but never in general management. Boehms came up through the management training program and had been in general management since 1976. Moreover, most of plaintiff's experience with TVA had been with distributor relations dealing with the power distributors. Although familiar with operations, he had never been involved with the day-to-day operations of a power system from the "nuts and bolts" standpoint. Throughout his years with TVA Boehms received consistently excellent performance appraisals until Parrish became his supervisor in the months of the '91-'92 reorganization. Parrish's evaluation in October 1991 was considerably subdued. Out of 16 areas reviewed Parrish gave Boehms the highest mark in only three, with low marks in influencing other, innovating, oral communications and

subordinate development. These low marks were based upon certain factual events which, in the opinion of the court, were considerably blown out of proportion to justify the subsequent offer to Boehms of the OM job. The areas of low evaluation were entirely discredited by evidence from plaintiff of his successful management and use of staff, community involvement, cordial customer relations, and efficient problem-solving. The court concludes that even the language used to support the choice of Wardlaw — that he could "meet the new vision. . .and the changes that were going to take place" — is nothing more than an indirect way of saying that he was younger. Witnesses who testified to the contrary are not credible on this issue.

Of equal significance is the fact that similar demotions were happening to other older district managers in the seven districts under Parrish's control: all district managers under age 45 were shifted from the district manager to the CSC position; all those 45 or older were offered the OM job. Moreover, Parrish was clearly conscious of age during the interview process by noting on his standard interview question at question G the notation "Don't talk about age." (Defendant's Exhibit 12). The question involved asked the interviewee "Where do you want to be in 5-10 years." That question, when considered in light of the notation has much more of an impact on older employees nearing the end of their career and is considered by the court to be clear evidence that age was a determinative factor in the employment decision. Defendants' assertions to the contrary are simply not believable, especially when compared to the fate of the older district managers under Parrish's supervision as noted previously.

The evidence persuades the court that Boehms was not offered the CSC manager's position because of his age and that the defendants' assertions to the contrary were pretextural. Business judgment may not be utilized as a

shield against age discrimination when age becomes the determinative factor as in this case.

Damages

The evidence is clear that when Boehms left TVA he attempted but was unable to find substantially equivalent work. The defendant contends, however, that Boehms' failure to accept the OM position is tantamount to failure to mitigate his damages, since the OM position was of equal pay to the CSC manager's position. However, the testimony was convincing that the OM position was not equal instatus and was viewed as inferior to the CSC manager job. The OM job description showed an annual operating budget of $2 million with supervision of approximately 32 employees. The job description for CSC Manager in Tupelo reveals an annual operating budget of $3.3 million with supervision of 49 employees. Plaintiff contends that he was not required to mitigate his damages by accepting an "inferior" position even if it was of equal pay.

A plaintiff is required to mitigate his damages by seeking "substantially equivalent" employment, defined as "virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status. . . ." Sellers v. Delgado Community College, 839 F.2d 1132, 1138 (5th Cir. 1988). In order for an employee to recover back pay for lost wages beyond the date of his retirement, the evidence must establish that the employer constructively discharged the employee. Jurgens v. E.E.O.C., 903 F. 2d 386, 389 (5th Cir. 1990). Constructive discharge occurs whenever an employer "deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1075).

The court finds that plaintiff sufficiently mitigated his damages by remaining in the TVA's employee transition

program and by searching for substantially similar employment both before and following his retirement from TVA. The trial record before the court is insufficient to determine a suitable award of damages, if any, or the impact of Boehms' retirement upon the calculation of damages. The parties are invited to submit briefs within ten days from the date of this opinion on the appropriate damages in this case.

This the 15th Day of May, 1996.

Jerry A. Davis
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JOE BOEHMS — PLAINTIFF

V. — NO. 1:94CV21-JAD

CRAVEN CROWELL, ET AL — DEFENDANTS

MEMORANDUM OPINION

Pursuant to the court's Memorandum Opinion dated May 15, 1996, finding that the plaintiff was the victim of age discrimination when he was not selected to be manager of the Tennessee Valley Authority's Customer Service Center in Tupelo, Mississippi, the parties have submitted further briefs on the issue of plaintiff's damages. The court is now prepared to rule on the issue of plaintiff's damages.

The law is well-settled in the Fifth Circuit that an employee must show that he was constructively discharged in order to recover back pay for lost wages beyond the date of his retirement or resignation. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65-66 & n.8 (5th Cir. 1980); Jurgens v. E.E.O.C., 903 F.2d 386, 389 (5th Cir. 1990). A constructive discharge occurs when "the working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to [retire]." Bourque, 617 F.2d at 65 (quoting Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977). While the court is sympathetic to plaintiff's claim, the proof fails to show the "aggravating factors" necessary for a constructive discharge. McCann v. Litton Systems, Inc., 986 F.2d 946 (5th Cir. 1993); Stephens v. C.I.T. Group/Equipment Financing, Inc.,

955 F.2d 1023 (5th Cir. 1992). As noted in the prior opinion of this court, the operations manager position offered to plaintiff, while equal in pay, was not equal in status and was viewed as inferior to the customer service center manager position. However, the evidence is clear in this case that plaintiff could not reasonably believe his demotion was a "harbinger of dismissal." Stephens, 955 F.2d at 1028. Plaintiff was offered another job, even though viewed as inferior, and several other former district managers accepted positions as operations managers in the new reorganization. There is simply no proof that plaintiff's situation is materially distinguishable from the former district managers who remained, other than personal preference. Moreover, there is no proof in the record that plaintiff's "working conditions [were] so intolerable that [he was] forced into an involuntary resignation." Young v. Southwestern Savings & Loan Association, 509 F.2d 140, 144 (5th Cir. 1975).

Clearly, plaintiff was distressed that he was placed in a position that lowered his status in the eyes of his fellow employees and himself, especially after the long years of employment with TVA. This distress alone is simply not enough to show constructive discharge under the law of this circuit. While it seems inadequate to correct a finding of age discrimination, the court finds that plaintiff is entitled to recover the sum of $4,688.24 which reflects the back pay for the period between his nonselection on January 15, 1992, and his retirement on November 13, 1992 ($67,547.57 - $62,859.33 = $4,688.24).

While the court is aware that some circuits have refused to order the recovery of attorney's fees against federal defendants in ADEA cases, see, e.g., Lewis v. Federal Prison Industries, Inc., 953 F.2d 1277, 1281-82 (11th Cir. 1992); Palmer v. GSA, 787 F.2d 300, 302 (8th Cir. 1982), the Fifth Circuit has allowed such awards to stand. Smith v. Office of Personnel Management, 778 F.2d 258, 264 (5th Cir. 1985),

cert. denied 476 U.S. 1105 (1986). An award of reasonable attorney's fees in this case clearly effectuates the purposes of the ADEA, particularly in light of the limited damages available to plaintiff. Accordingly, the court finds that plaintiff is entitled to a reasonable attorney's fee to be determined in accordance with the court's local rules.

A separate judgment will be entered.

This 1st day of October, 1996.

Jerry A. Davis
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JOE BOEHMS — PLAINTIFF

V. — CIVIL NO. 1:94CV21-JAD

CRAVEN CROWELL, ET AL — DEFENDANTS

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT

The court has considered plaintiff's motion to alter or amend the judgment in this case and finds that the motion should be **denied**. While the court found that plaintiff was not required to take the operation manager's position in order to mitigate his damages, the court remains of the opinion that the damages as determined by the court correctly assessed his choice of retirement after the completion of the Employee Assistance Program.

Plaintiff shall submit his request for attorney's fees by January 10, 1997.

SO ORDERED, this the 20th Day of December, 1996.

Jerry A. Davis
UNITED STATES MAGISTRATE JUDGE

xxx

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 97-60030

JOE F. BOEHMS

Plaintiff - Appellant - Cross-Appellee

V.

CRAVEN CROWELL, in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority; BILL KENNOY, in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority; JOHNNY HAYES, in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority

Defendants - Appellees - Cross-Appellants

Appeal from the United States District Court for the Northern District of Mississippi, Aberdeen

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ON PETITION FOR REHEARING

Before HIGGINBOTHAM and STEWART, Circuit Judges, and WALTER,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT on June 12, 1998,

Carl E. Stewart
United States Circuit Judge

*District Judge of the Western District of Louisiana, sitting by designation.

REHG-2

Supreme Court, U.S.
FILED
DEC 11 1998
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No. 98-456

In the Supreme Court of the United States

OCTOBER TERM, 1998

JOE BOEHMS, PETITIONER

v.

CRAVEN CROWELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 29 U.S.C. 633a (1994 & Supp. II (1996)) authorizes an award of backpay for the period following a federal employee's retirement from federal service.

2. Whether Section 633a authorizes an award of attorney's fees to successful claimants.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-456

JOE BOEHMS, PETITIONER

v.

CRAVEN CROWELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-xx) is reported at 139 F.3d 452. The May 15, 1996 (Pet. App. xxi-xxvi), October 1, 1996 (Pet. App. xxvii-xxix), and December 20, 1996 (Pet. App. xxx) orders of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1998. A petition for rehearing was denied on June 12, 1998. Pet. App. xxxi-xxxii. The petition for a writ of certiorari was filed on September 10, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a former employee of the Tennessee Valley Authority (TVA), a corporate agency of the United States. See generally *Ashwander* v. *TVA*, 297 U.S. 288, 315 (1936); Pet. App. xviii. In April 1991, TVA reorganized its Customer Group, transforming its 15 district offices into 13 customer service centers (CSCs). Under the reorganization, each CSC was headed by a CSC manager, assisted, at the top of the organizational hierarchy, by an operations manager and a marketing manager. Petitioner, who was then 55 years old and had been manager of TVA's Tupelo district office for approximately three years before the reorganization, applied for the CSC manager position at the Tupelo CSC after the reorganization. In January 1992, petitioner's supervisor informed him that another employee, who was then 32 years old, had been selected for that position, but that petitioner could have the job of operations manager. If petitioner had taken that job, he would have continued earning an annual salary (approximately $70,000) identical to the salary he had earned as district manager. Pet. App. ii-iii, x; Stipulation of Facts (Stip.) ¶ 8.

Petitioner considered the offer a demotion and did not accept it. Because his existing job was being eliminated in the reorganization, he enrolled in TVA's Employee Transition Program (ETP), which allowed him to remain on the TVA payroll for up to six months while he looked for suitable alternative employment, both within and outside of TVA. During that period, petitioner twice rejected offers for the CSC operations manager position at the center in West Point, Mississippi, and he refused to entertain similar positions advertised at other offices. No CSC manager position be-

came available, and no other employment opportunities arose that petitioner found satisfactory. In November 1992, petitioner was "reduced in force," and, invoking his retirement privileges, he became eligible to receive federal retirement benefits. See Pet. App. iii-iv, xiii-xiv; see also Boehms C.A. Br. 30 (noting petitioner's receipt of "retirement benefits").

2. On May 19, 1992, several months after his non-selection for the CSC manager's position but nearly six months before his retirement, petitioner filed an administrative complaint with TVA. He alleged that his nonselection was based on age and that it violated the provisions of the Age Discrimination in Employment Act (ADEA) applicable to federal employment. See 29 U.S.C. 633a (1994 & Supp. II 1996). After failing to obtain administrative relief, petitioner filed suit under Section 633a in district court. That court found that petitioner was denied the manager's position because of his age, in violation of Section 633a (Pet. App. xxii-xxv), and it granted him a backpay award for the period between his nonselection on January 15, 1992 and his retirement on November 13, 1992 (*id.* at xxviii). The court rejected petitioner's request for additional backpay beyond the date of his retirement on the ground that such relief is available only when an employee is "constructively discharged," a claim that petitioner could not make here. *Id.* at xxvii. The district court then granted petitioner attorney's fees, even though it acknowledged that many courts "have refused to order the recovery of attorney's fees against federal defendants" in cases arising under Section 633a. *Id.* at xxviii.

3. The court of appeals affirmed on the issues of liability and damages but vacated the award of attorney's fees. Like the district court (Pet. App. xxv-

xxvi), the court of appeals rejected TVA's argument that, by declining offers of employment as a CSC operations manager, petitioner had failed to "mitigate damages" during the period in which he was enrolled in the ETP. The court thus upheld the district court's award of backpay for the entire period leading up to petitioner's retirement. *Id.* at ix-xii.

The court separately upheld the district court's refusal to grant additional backpay for the period following that retirement. Relying on its earlier decision in *Jurgens* v. *EEOC*, 903 F.2d 386 (5th Cir. 1990), the court reaffirmed that, to be eligible for such an award, the employee must demonstrate that he had been "constructively discharged" from his job. Pet. App. xiii. Petitioner, the court held, could make no such showing: "When he chose to retire from TVA, [petitioner] had, at the very least, an offer to remain as Tupelo CSC [operations] manager at the same salary he had been earning as district manager. In addition, several district managers other than [petitioner] accepted positions as CSC operations managers pursuant to TVA's agency-wide reorganization." *Id.* at xiv. The court concluded that, because acceptance of such a position would plainly not have been "so intolerable that a reasonable person would have felt compelled to resign," petitioner could not claim constructive discharge and therefore could not recover post-retirement backpay. *Ibid.*

Finally, the court rejected petitioner's claim that he was entitled to attorney's fees directly under Section 633a. The court held that, as distinguished from the provisions of the ADEA applicable to private-sector age discrimination (see 29 U.S.C. 626(b)), Section 633a contains no provision authorizing such a fee award. Although Section 633a(c) does authorize a district court to provide "such legal and equitable relief as will ef-

fectuate the purposes" of the ADEA, the court followed the First Circuit's decision in *Nowd* v. *Rubin*, 76 F.3d 25 (1996), in holding that Section 633a(c) does not "overcome either the doctrine of sovereign immunity or the so-called American Rule of attorney's fees." Pet. App. xvi. The court remanded the case, however, for a determination as to whether petitioner might nonetheless be entitled to attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(b). Pet. App. xvii.

DISCUSSION

1. Petitioner first challenges (Pet. 7-8) what he characterizes as the court of appeals' holding "that a failure to reasonably mitigate damages cuts off all backpay regardless of whether reasonable mitigation could equal complete mitigation of lost wages." Pet. 7. That challenge is difficult to understand. Rejecting TVA's arguments to the contrary, the court of appeals held that petitioner *had* "mitigated damages"—even though he persistently rejected offers of employment at the same salary he had received before TVA's 1991 reorganization—and that he was therefore entitled to full backpay for the entire period preceding his voluntary retirement from federal service. See Pet. App. ix-xii. For that reason, petitioner's arguments concerning "mitigation" (Pet. 7-8)—the subject of the first two questions presented in the petition (Pet. 1)—are largely irrelevant to the proper disposition of this case.

Petitioner appears to have conflated two quite different issues arising under the provisions of the ADEA specific to federal employment (29 U.S.C. 633a (1994 & Supp. II 1996))[1]: whether a federal employee

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[1] "[S]ection 633a is a self-contained provision applicable exclusively to ADEA claims against public sector employers." *Nowd* v. *Rubin*, 76 F.3d 25, 27 (1st Cir. 1996); see 29 U.S.C. 633a(f). In

alleging violations of those provisions has reasonably mitigated damages during periods for which he would otherwise be entitled to backpay, and whether that employee is entitled to backpay for the period following his voluntary retirement from federal service. Because petitioner prevailed on the first issue in the court of appeals, only the second is presented here. And, with respect to that issue, the court of appeals correctly held that petitioner was ineligible for backpay for the period following his retirement because he could not plausibly claim that he had been "constructively discharged." Pet. App. xiii-xiv (following *Jurgens* v. *EEOC*, 903 F.2d 386 (5th Cir. 1990)).

The court of appeals' factbound determination that petitioner had not been constructively discharged sharply distinguishes this case from the private-sector employment cases from other courts of appeals that petitioner mistakenly characterizes (Pet. 7-8) as conflicting with the decision below. Those cases, unlike this one, *did* involve either a constructive discharge or an outright dismissal.[2] Whereas involuntary termination

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enacting Section 633a as an amendment to the ADEA, "Congress chose to create a separate and discrete federal remedial scheme rather than subsume [federal] employees under the pre-existing enforcement procedures in the private sector." *Lewis* v. *Federal Prison Indus., Inc.*, 953 F.2d 1277, 1283 (11th Cir. 1992). See generally *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981).

[2] See *Booker* v. *Taylor Milk Co.*, 64 F.3d 860 (3d Cir. 1995) (claim of racially motivated discharge under Title VII of the Civil Rights Act of 1964, see 42 U.S.C. 2000e-5(g)(1)); *Syvock* v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 159-160 (7th Cir. 1981) (claim of discriminatory layoff and refusal to rehire under private-sector provisions of ADEA), overruled on other grounds by *Coston* v. *Plitt Theatres, Inc.*, 860 F.2d 834 (7th Cir. 1988); *Cassino* v. *Reichhold Chems., Inc.*, 817 F.2d 1338 (9th Cir. 1987) (claim of discriminatory firing under private-sector provisions of ADEA), cert.

is *itself* often the basis for a discrimination claim (subject to a duty to mitigate post-termination damages), voluntary retirement of the kind at issue here gives rise to no such claim.[3] Moreover, contrary to petitioner's suggestion (Pet. 9-10), there is nothing anomalous about the rule entitling a federal employee to collect backpay from the government for the period during which he remained in federal service, but not for the period following his voluntary retirement, during which he performs no work for the government and becomes eligible for federal retirement benefits. Indeed, petitioner's contrary interpretation of Section 633a would conflict with the principle that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane* v. *Peña*, 518 U.S. 187, 192 (1996); see, *e.g.*, *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981); *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

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denied, 484 U.S. 1047 (1988); *Brady* v. *Thurston Motor Lines, Inc.*, 753 F.2d 1269 (4th Cir. 1985) (claim of racially discriminatory discharge under Title VII); *EEOC* v. *Delight Wholesale Co.*, 973 F.2d 664 (8th Cir. 1992) (claim of gender-based constructive discharge under Title VII); see also *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 231 (1982) (interpreting duty to mitigate under 42 U.S.C. 2000e-5(g) in Title VII case involving discriminatory refusal to hire).

[3] The petition does not present, and petitioner has not preserved, any claim of constructive discharge. See, *e.g.*, Stip. ¶ 6 (confirming that administrative complaint underlying these proceedings was filed in May 1992, several months before petitioner's retirement). Like the district court (Pet. App. xxii, xxviii), the court of appeals determined, on the facts of this case, that petitioner's departure from government service was a voluntary retirement, despite the characterization of that retirement as a "reduc[tion] in force." See *id.* at xiii-xiv; see also *id.* at iv. That determination was factbound and correct.

2. The third question presented in the petition is whether "a successful age discrimination plaintiff [is] entitled to seek an award of attorney['s] fees" in cases arising under Section 633a. Pet. 1; see Pet. 11. As an initial matter, this case would be an odd vehicle for this Court's consideration of that issue. The court of appeals held that, even though Section 633a does not itself authorize an award of attorney's fees, the Equal Access to Justice Act, 28 U.S.C. 2412(b) (EAJA), might nonetheless support such an award in this case, and it remanded to the district court for further consideration of the issue. See Pet. App. xv-xviii. Petitioner neither mentions that remand order nor explains why, in these circumstances, any fee award under EAJA would be inadequate.

In any event, the court of appeals was correct in holding that Section 633a does not itself support awards of attorney's fees. Waivers of the government's sovereign immunity must be unequivocally expressed, and courts should "not enlarge the waiver 'beyond what the language requires.'" *Library of Congress*, 478 U.S. at 318 (quoting *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983)). As distinguished from the provisions of the ADEA applicable to the private sector (see, *e.g.*, 29 U.S.C. 626(b)), Section 633a contains no authorization for such awards. See generally 29 U.S.C. 633a(f); *Lewis*, 953 F.2d at 1283. And, as the court of appeals explained, "the generalized language" of Section 633a(c), which authorizes only "such legal and equitable relief as will effectuate the purposes" of the ADEA, "cannot be interpreted as * * * an *unequivocal* waiver of the government's sovereign immunity *vis a vis* awards of attorney's fees." Pet. App. xvii (citing *Nowd* v. *Rubin*, 76 F.3d 25, 27 (1st Cir. 1996)). Petitioner's claim is also independently foreclosed by the

so-called American Rule of attorney's fees: that, in the absence of an express statutory authorization to the contrary, litigants must pay their own such fees. *Id.* at xvi-xvii (citing *Nowd*, 76 F.3d at 27).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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